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KOFRI MUSTAFAR

v.

PP

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COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
KN SEGARA JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: C-05-44-2001]

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28 OCTOBER 2009

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Conviction and sentence - Appeal against - Defence - Loss of memory - Whether unacceptable and rejected - Unsound mind - Failure to adduce medical*

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evidence - Failure to rebut prosecution's case - Whether prosecution proved case beyond reasonable doubt

EVIDENCE: *Witness - Corroboration - Whether witness's sworn evidence corroborated by independent evidence - Whether evidence entitled to credence*

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The appellant was indicted under s. 302 of the Penal Code before the learned High Court judge and was found guilty. He was accordingly convicted and sentenced to death by hanging. Hence, the appellant appealed. The appellant was charged for causing the

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death of one Jemilah Mat Idris ('deceased') by striking her in the neck and forehead with a piece of metal. SP8, daughter of the deceased, who had witnessed the incident, testified that her mother had not struggled or fought back. According to SP8, the appellant had several times threatened to kill the deceased for rejecting his

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overtures to marry her. SP8 had seen blood oozing from the deceased's neck and forehead and saw her unconscious due to that brutal attack. SP5, who did the post mortem on the deceased, testified that the reason for her death was that there was severe injury to the forehead as a result of being stuck at least thrice by a

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blunt object. SP8 confirmed the identification of the appellant at an identification parade and in court as the murderer. The learned judge at the end of the prosecution was satisfied that a *prima facie* case of murder under s. 302 of the Penal Code had been established. The learned judge was satisfied that SP8's evidence had

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materially been supported by independent evidence, amongst others

not only of the presence of the appellant with the deceased when the attack took place, the identity of the assailant being established but also his intention to kill the deceased. At the defence stage the appellant alleged that SP8 was an interested witness and not corroborated by any independent evidence, therefore her evidence was unreliable and should be rejected. Added to that, in the course of his defence he testified that he suffered memory afflictions while his other witnesses equated that as insanity.

Held (dismissing the appeal):
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) SP8's sworn evidence had been corroborated in every way by independent evidence especially by SP7, the presence of SP11's motorcycle which had been borrowed by the appellant earlier, and the evidence of SP4 and SP9. There was no known legal presumption or otherwise, that states that every time an interested witness testifies his evidence must be disbelieved without more. Unless there was any cogent evidence to show otherwise, the evidence of the witness is entitled to be believed. In this case, SP8 merely related what happened on that day, and without any contrary evidence having been adduced her evidence was entitled to credence. (para 12)

(2) The appellant had put up a defence of loss of memory whilst unwittingly his other witnesses were alleging he was of unsound mind. His defence route in a nutshell was at variance with that of his other witnesses. At no stage of his testimony did he evince that he was of unsound mind. This independent defence of loss of memory as testified by the appellant himself was rejected by the learned judge, as it was unacceptable that he could not remember the incriminating memories whilst he could remember incidents that had no connection to the murder incident, though they had happened at about the same time. (para 13)

(3) This defence of unsound mind needed to be established at the earliest possible moment *ie*, at the prosecution's stage. This was to avoid any allegation of afterthought. Regretfully for the appellant this did not take place here. Matters were also not in his favour as even at the defence stage he failed to adduce any medical evidence of his mental unsoundness. Under s. 105 of the Evidence Act, the legal burden was on the appellant to

establish the fact that he committed the act in a moment of unsound mind. Having perused the evidence in totality, this defence had not been successfully established and thus could not stand. (paras 21 & 22)

(4) By virtue of the appellant's failure to rebut the prosecution's case, it was no surprise that the learned judge was satisfied that the prosecution had proven its case beyond reasonable doubt, hence the finding of guilt, followed by the conviction and sentence of death. Based on all the above reasons, this court had no compunction in dismissing the appeal. The finding of guilt, the conviction and also the sentence of death was affirmed. (para 24)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh di bawah s. 302 Kanun Keseksaan di hadapan Hakim Mahkamah Tinggi dan didapati bersalah. Beliau seterusnya disabit kesalahan dan dihukum gantung sehingga mati. Oleh itu, perayu telah membuat rayuan ini. Perayu dituduh menyebabkan kematian satu Jemilah Mat Idris ('simati') dengan memukul leher dan dahi simati dengan sekeping logam. SP8, anak perempuan kepada simati, yang telah menyaksikan kejadian tersebut, memberi keterangan bahawa emaknya tidak langsung lawan balik. Menurut SP8, perayu telah beberapa kali mengugut untuk membunuh simati kerana simati telah beberapa kali menolak lamarannya untuk berkahwin. SP8 telah melihat darah mengalir dari leher dan dahi simati dan oleh kerana serangan kejam tersebut emaknya tidak sedarkan diri. SP5, yang telah menjalankan bedah siasat ke atas simati, memberi keterangan bahawa sebab kematian adalah kecederaan parah kepada dahi akibat hentakan beberapa kali oleh objek yang tumpul. SP8 mengesahkan identiti perayu di perbarisan cam dan di dalam mahkamah sebagai pembunuh tersebut. Yang arif hakim di akhir kes pendakwaan berpuas hati bahawa satu kes *prima facie* pembunuhan di bawah s. 302 Kanun Keseksaan telah dibuktikan. Yang arif hakim berpuas hati bahawa keterangan SP8 telah disokong oleh keterangan bebas, antaranya bukan hanya dengan kehadiran perayu dengan simati apabila serangan itu berlaku, identiti penyerang telah dibuktikan dan juga niat perayu untuk membunuh simati. Pada peringkat pembelaan perayu telah berhujah bahawa SP8 adalah saksi berkepentingan dan tidak disokong oleh keterangan bebas, oleh itu keterangannya tidak boleh dipercayai dan sepatutnya ditolak. Selain daripada itu, semasa pembelaan perayu

beliau memberi keterangan bahawa beliau mengalami penderitaan- A
penderitaan ingatan dan dalam pada masa itu saksi-saksi perayu yang lain menyamakan itu sebagai ketaksiuman.

Diputuskan (menolak rayuan)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman B
mahkamah:

(1) Keterangan bersumpah SP8 telah disokong oleh keterangan bebas terutama sekali oleh SP7, kehadiran motosikal SP11 yang telah dipinjamkan kepada perayu dan keterangan SP4 dan SP9. C
Tidak terdapat anggapan undang-undang atau sebaliknya, yang menyatakan bahawa setiap kali seorang saksi berkepentingan memberi keterangan ia tidak boleh dipercayai. Kecuali terdapat keterangan kukuh yang menunjukkan yang sebaliknya, keterangan saksi harus dipercayai. Di dalam kes ini, SP8 telah D
menyatakan apa yang berlaku pada hari kejadian tersebut, dan tanpa keterangan sebaliknya diberikan keterangan SP8 berhak diberi kepercayaan.

(2) Perayu telah membangkitkan pembelaan kehilangan daya ingatan dan pada masa yang sama saksi-saksi perayu yang lain E
berhujah bahawa perayu mengalami penyakit sakit jiwa. Jalan pembelaannya adalah berbeza daripada yang dinyatakan oleh saksi-saksinya yang lain. Perayu tidak memperlihatkan bahawa beliau mengalami penyakit sakit jiwa pada mana-mana peringkat F
testimoni beliau. Pembelaan asing kehilangan daya ingatan seperti yang diberikan oleh perayu sendiri telah ditolak oleh yang arif hakim, kerana hakim tidak dapat menerima bahawa perayu tidak boleh ingat kejadian-kejadian yang menunjukkan beliau bersalah tetapi boleh ingat kejadian-kejadian yang tidak G
berkaitan dengan pembunuhan tersebut, walaupun ia berlaku pada masa yang sama.

(3) Pembelaan sakit jiwa mestilah dibuktikan pada peringkat paling awal iaitu pada peringkat pendakwaan. Ini adalah untuk
mengelakkan apa-apa tuduhan bahawa ia adalah perkara yang H
difikirkan kemudian. Dengan kesalnya bagi pihak perayu ini tidak dilakukan. Hal-hal juga tidak memihak kepada perayu kerana di peringkat pembelaan beliau gagal mengemukakan apa-apa keterangan perubatan mengenai keadaan ketaksempurnaan
mental perayu. Di bawah s. 105 Akta Keterangan, beban I
undang-undang adalah ke atas perayu untuk membuktikan bahawa perayu telah melakukan pembunuhan dalam keadaan

A hilang akal. Setelah meneliti keterangan-keterangan secara keseluruhan, pembelaan ini tidak berjaya dibuktikan dan tidak boleh berdiri.

(4) Mengambilkira kegagalan perayu untuk mematahkan kes
B pendakwaan, ia bukanlah satu kejutan bahawa yang arif hakim telah berpuas hati bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan yang munasabah, dengan itu penemuan bahawa perayu bersalah, diikuti dengan sabitan dan hukuman mati. Berdasarkan alasan-alasan yang telah diberi,
C mahkamah ini menolak rayuan tersebut tanpa ragu-ragu. Dapatan bersalah, sabitan dan hukuman mati telah diesahkan.

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Balasingham v. PP [1959] 1 LNS 8 HC ***(refd)***
D *Jayasena v. R [1970] 1 All ER 219* ***(refd)***
John Dawlat Moon [1927] 29 Cr LJ 393 ***(refd)***
Mc Naghten [1843] 10 Cl & Fin 200 ***(refd)***
Nobin Chunder Banerjee [1873] 20 WR (Cr) 70 ***(refd)***
Nota Ram [1866] PR No 56 of 1866 ***(refd)***
E *PP v. Fong Chee Cheong [1969] 1 LNS 128 HC* ***(refd)***
Woolmington v. DPP [1935] AC 462 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 342
Evidence Act 1950, ss. 45, 105
F Penal Code, ss. 84, 302

Other source(s) referred to:
The Law of Crimes, Ratanlal, p 165

For the appellant - Muhammad Faiz Fadzil; M/s Faiz Fadzil & Co
G *For the respondent - Tengku Amir Zaki Tengku Hj Abdul Rahman; AG's Chambers*

Reported by Suhainah Wahiduddin

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JUDGMENT

Suriyadi Halim Omar JCA:

[1] The appellant was indicted under s. 302 of the Penal Code
I before the learned High Court judge and was found guilty. He was accordingly convicted, and sentenced to death by hanging. He filed an appeal and this panel heard it but at the end of the hearing dismissed it. We also affirmed the conviction and sentence.

[2] The charge reads as follows:

> Bahawa kamu pada 23hb Julai 1999 jam lebih kurang 8.30 pagi, bertempat di Simpang Permatang Durian, Nenasi, dalam Daerah Pekan dalam Negeri Pahang Darul Makmur, dengan niat membunuh, didapati telah menyebabkan kematian kepada Jemilah bt Mat Idris kp No. 630408-06-5438, berumur 36 tahun, maka kamu dengan ini telah melakukan kesalahan membunuh dengan niat yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[3] The flow of the case and evidence is as follows:

[4] The prosecution had called 17 witnesses with SP8 as the main witness. This witness, who is the daughter of the deceased ie, Jemilah bt Mat Idris, evinced that on 23 July 1999 at about 8.30am the appellant had persuaded the deceased and her to follow him on the pretext that his mother had invited them to his mother's house. The deceased and SP8 believing in his inducement followed him. She rode a motorcycle, with the deceased riding pillion. The appellant rode another motorcycle. Along the way, the motorcycle of the appellant fell. SP7, a labourer who was laying pipes at that time helped to retrieve the motor cycle. From this vehicle he saw a piece of metal (P10) falling on the ground, the very item used to hit the deceased. He positively identified that piece of metal at the police station and in court. SP8 also saw it falling off the motorcycle of the appellant. This metal was later retrieved from the scene by SP17 ie, the investigation officer. SP12, a policeman confirmed that SP8 and SP7 identified the piece of metal which fell off the motorcycle in the course of the investigation. SP7 also identified SP8 as the girl who was with the deceased at the time he helped retrieve the appellant's motorcycle. This piece of information confirmed the evidence that SP8 was with the deceased during the time of the incident. To add to the above pieces of evidence, to connect the appellant to the incident, SP17 found the appellant's abandoned motorcycle (PAH 2437) about 1.5 kilometre away. SP11, the brother of the appellant and owner of the vehicle confirmed that he loaned that motorcycle to him a day before the incident. When examined he told the court that he had no idea why his vehicle was left abandoned. Since there is no complaint of his motorbike being stolen, or it having been taken away from him without permission, the irresistible conclusion is that the appellant had ridden SP11's motorcycle on that material date when he was with the deceased

A and SP8, and later abandoned it near the place of incident in his bid to escape. What is pertinent is that the recovery of the motorcycle confirmed the fact that the appellant was near the scene of the murder. SP8's overwhelming evidence merely sealed his fate.

B **[5]** Returning to the flow of the evidence, the deceased and SP8 eventually arrived at the appellant's mother's house, but on the pretext that she was not in, told them to follow him to Kampung Permatang Kuantan. Likewise, she was not there. They then returned to the deceased's house. *Enroute* home the appellant C stopped the deceased and struck her with that piece of metal (P10). In a nutshell when the appellant hit the deceased, SP8 was there and had witnessed the incident first hand. Before striking the deceased at the place of incident whilst they were still astride on the motorcycle, the appellant again repeated the threat and its D reason. She saw the appellant then striking the deceased's neck and forehead with great force. She testified that her mother who was on the motorcycle never struggled or fought back. Apart from the impossibility of defending herself due to her predicament, it would also go against the grain of logic to pick a quarrel with the E appellant. By no account of reason or logic, the deceased could have physically done anything that deserved the kind of retribution emanating from the appellant. SP8 saw blood oozing from the deceased's neck and forehead and saw her unconscious due to that brutal attack. She confirmed the identification of the appellant at F an identification parade and in court as the murderer.

[6] So, why did the appellant kill the deceased? According to SP8, the appellant had several times threatened to kill the deceased for rejecting his overtures to marry her ie, SP8. The latter told a G few people including the aunt of the deceased ie, SP4 of this threat. The latter's house which is about "an electric pole" apart from that of the deceased's house confirmed that the appellant often came to that house. SP9 also confirmed that SP8 related the threat to him. There was thus consistency in her story of the appellant's threat.

H **[7]** The medical reports established that the deceased died of injuries after being hit by a hard object. SP5 who did the post mortem found the following injuries:

- 1 luka robek yang tak teratur pada dahi kiri di atas kening I berukuran 6.5 x 2 cm.

- Luka robek berbentuk bulan sabit pada pelipis kiri di hujung luar sudut mata kiri berukuran 2.5 x 0.7 cm.

- Luka robek yang dangkal pada sudut dagu sebelah kiri berukuran 3 x 0.7 cm.

- Pada dagu kiri tersebut terdapat luka calar berganda bergaris.

- Luka calar bercorak seperti kesan rantai leher pada leher kiri berukuran 15 x 0.5 cm.

- Lebam yang luas pada leher dan dagu kiri.

- Lebam yang agak luas pada bahu kiri.

[8] He further testified:

> Saya teruskan dengan pemeriksaan dalam kepala. Terdapat bekuan darah di bawah kulit kepala di belakang telinga kanan di sekitar mastoid. Tulang tengkorak-patah tulang tengkorak frontal kiri pada bahagian *supra* - orbital reach. Patah tulang ini berkeping-keping dan lekuk ke dalam dan bentuknya melengkung. Patah ini berlanjutan ke tulang dasar tengkorak *supra*-orbital dan ethmoid. Tulang zygoma kiri juga patah.
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> Pemeriksaan otak - terdapat pendarahan sub durra. Otaknya 1200 gm dan sembab.
>
> Bahagian tubuh yang lain saya tidak periksa.
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> Sebab kematian ialah kecederaan kepala teruk akibat terkena benda tumpul.
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> ... Pada pendapat saya serangan datang sekurang-kurangnya 3 kali.
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> ... Pada jasad tidak terdapat luka tangkis yang ketara. Oleh itu pada pendapat saya tidak ada pergelutan. Saya nampak serangan datang dengan tiba-tiba tanpa warning. Ini disebabkan tiada luka tangkis ...
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> ...
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> Setuju 3 jenis kecederaan didapati. ... Pada pengamatan saya luka robek di dahi yang menampakkan otak menyebabkan kematian. ... Melihatkan main injury di sini kemungkinannya tipis bagi mangsa untuk hidup mahupun dengan rawatan. ... Luka calar tidak fatal. Yang fatal ialah luka yang memecahkan tulang tengkorak. Daripada pengalaman saya dengan luka seperti ini jarang mangsa yang survive.

[9] In brief SP5 found dried blood below the skin behind the right ear around the mastoid region with the skull crushed. Blood was found in the deceased's brain. The reason for her death was

A that there was severe injury to the forehead as a result of being struck at least thrice by a blunt object. SP5 believed that the attack came without warning and the deceased put up no struggle at any time; this confirmed SP8's testimony. By his account, the deceased would not have survived the injuries found on the forehead which
B had led to the skull being crushed, leading to the exposure of the brain.

[10] The learned judge at the end of the prosecution was satisfied that a *prima facie* case of murder under s. 302 of the Penal Code
C had been established. He was satisfied that SP8's evidence had materially been supported by independent evidence, amongst others not only of the presence of the appellant with the deceased when the attack took place, the identity of the assailant having been established, but also his intention to kill the deceased. We therefore
D rejected the contention that the prosecution's case depended much on circumstantial evidence. We were thus satisfied that the learned judge had not committed any error when he was satisfied that a *prima facie* case had been established by the prosecution and thereafter calling the defence.

E **[11]** At the defence stage the appellant elected to give evidence on oath. He called his father and two sisters as his witnesses. The appellant's case began by alleging that SP8 was an interested witness and not corroborated by any independent evidence. Her evidence therefore was unreliable and to be rejected. On that score
F the prosecution had failed to established its case. Added to that, in the course of his defence he testified that he suffered memory afflictions. His other witnesses equated that as insanity. As regards this defence of insanity, ventilated during the full trial and also before us, the appellant in his written submission wrote:
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> Oleh itu ia menyokong pembelaan tidak waras (insanity) perayu sepertimana yang berlaku ke atas si mati. Perayu tidak ingat akan kejadian sebenar ketika beliau memukul si mati. Ini menunjukkan bahawa beliau telah hilang ingatan ketika itu. Berdasarkan kepada
> H fakta dan hujahan di perenggan 5.4 di atas, maka ketiadaan motif menyokong pembelaan tak waras (insanity).

[12] Before touching on his defence, may we discuss the issue of whether by so being in an 'interested position' this had affected SP8's evidence. It must, at the outset be stated that her sworn
I evidence had been corroborated in every way by independent evidence especially by SP7, the presence of SP11's motorcycle, which had been borrowed by the appellant earlier, and the evidence

of SP4 and SP9. There is no known legal presumption or otherwise, that states that every time an interested witness testifies his evidence must be disbelieved without more. Unless there is any cogent evidence to show otherwise his evidence is entitled to be believed (*PP v. Fong Chee Cheong* [1969] 1 LNS 128; *Balasingham v. PP* [1959] 1 LNS 8). In this case, she merely related what happened on that day, and without any contrary evidence having been adduced her evidence was entitled to credence.

[13] It was obvious that the appellant had put up a defence of loss of memory whilst unwittingly his other witnesses were alleging he was of unsound mind. His defence route in a nutshell was at variance with that of his other witnesses. At no stage of his testimony did he evince that he was of unsound mind. This independent defence of loss of memory as testified by the appellant himself was rejected by the learned judge, as it was unacceptable that he could not remember the incriminating memories whilst he could remember incidents that had no connection to the murder incident, though they had happened at about the same time. We reproduce what the learned judge said, and it reads:

> Pembelaan tertuduh secara umum ialah dia tak ingat, dia tak tahu sementara saksi-saksinya cuba menimbulkan kemungkinan tertuduh mengalami kecacatan mental berdasarkan beberapa kejadian di rumahnya di mana tertuduh pernah memecah pinggan dan memukul pintu hingga pecah dan kemudian tak tahu/lupa apa yang telah dilakukan ... Walaupun jika diterima kemungkinan tertuduh tak sedar apa yang dilakukan pada masa-masa tertentu seperti dikatakan pernah berlaku adalah sukar untuk diterima dia tak ingat/sedar semuanya dibuktikan dilakukannya dalam jangka masa yang panjang sedangkan dia ingat pula perkara-perkara yang tidak boleh mengaitkannya dengan kesalahan ini dalam tempoh masa yang sama.

[14] As regards the bizarrely independent approach undertaken by the appellant's other witnesses, the reason for saying he was of unsound mind was that he had smashed the crockery, broken down the door and thereafter failing to remember or did not know what had transpired earlier. To top it all no medical evidence was adduced to support the unsound mind contention. Not surprisingly the learned judge also rejected that defence. In the broad grounds of judgment, he said:

> Mengenai keadaan mental tertuduh tiada bahan dikemukakan oleh pembelaan yang boleh menunjukkan dia tidak waras hingga tak tahu apa yang dilakukan itu satu kesalahan dari segi undang-undang. Keterangan saksi-saksi pembelaan bercanggah tentang hal ini dan

A hanya berapa dakwaan kosong ... Walaupun diterima tertuduh pernah berkelakuan aneh ia tidak semestinya bermakna dia tidak waras. Oleh itu tiada dikemukakan oleh pihak pembelaan apa-apa bahan yang boleh diterima untuk membolehkan Mahkamah ini membuat penentuan bahawa tertuduh tidak waras semasa melakukan perbuatan salah ini.

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[15] To be fair to the appellant, his counsel did file an application before the judge to have him referred to a psychiatrist pursuant to s. 342 of the Criminal Procedure Code, on the sole reason that he was never referred to one before. This was done before the first C prosecution witness was called. This relevant provision reads:

When a Judge ... holding a trial has reason to suspect that the accused person is of unsound mind and consequently incapable of making his defence, he shall in the first instance investigate the fact of such unsoundness.

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[16] The learned deputy public prosecutor objected to this application, as there was no reason or evidence adduced in court for him to be referred to any psychiatrist to establish the fact of his unsound mind. To apply under this provision, merely because he E had never been referred to a psychiatrist before *per se*, would surely not satisfy its prerequisites. As the learned judge found no suspicion of him suffering any form of unsoundness of mind, and alluding to his discretionary power had correctly rejected the application.

F **[17]** Perusing the notes of proceedings, the matter of unsound mind never cropped up again, whether during the prosecution's case, the close of its case, or even in the appellant's submission before the defence was called. It reared its head again only when the appellant's witnesses attempted to suggest (not by the appellant G himself), and without any medical basis, that he was of unsound mind.

[18] Section 84 of the Penal Code legislates that nothing is an offence which is done by a person who, at the time of doing it, by H reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. Even though the appellant has alluded to the term 'insane' in his submission, the phrase promulgated in s. 84 is 'unsoundness of mind'. "Insanity" which speaks of 'disease of the mind', is a term I used in *Mc Naghten* [1843] 10 Cl & Fin 200 or generally referred to as Mc Naghten's Rule.

[19] Section 84 demands that: A

i. at the time of doing it;

ii. the person by reason of unsoundness of mind;

iii. is incapable of knowing; B

iv. the nature of the act; or

v. that he is doing what is either wrong or contrary to law.

[20] Two limbs entitle him to an acquittal. First, if at the time of C doing the act, by reason of unsoundness of mind, he did not know the nature of the act, or if he knew the nature of the act did not know that it was either wrong or contrary to law (*Criminal Law in Singapore and Malaysia Text and Materials* by KL Koh, CMV Clarkson and NA Morgan). For purposes of this appeal, the crucial D time of having an unsound mind therefore is at the time of the brutal attack, and not before or after the act (*John Dawlat Moon* [1927] 29 Cr LJ 393); [1928] AIR (P) 363). A plea of unsoundness of mind at the time of trial will not avail an accused person (*Nota Ram* [1866] PR No 56 of 1866; *The Law of Crimes* by Ratanlal, E p. 165). Regardless of the other relevant prerequisites of s. 84, it is incontrovertible that unless this preliminary factor of unsoundness of mind is established first, this defence cannot prevail.

[21] It is established law that the burden of proof lies on the F appellant that is if he wishes the court to believe that he was of unsound mind at the time when he committed the offence. Needless to say, this defence of unsound mind needs to be established at the earliest possible moment ie, at the prosecution's stage. This is to avoid any allegation of afterthought. Regretfully for G the appellant this did not take place here.

[22] Matters were not in his favour again as even at the defence stage he failed to adduce any medical evidence of his mental unsoundness. Under s. 105 of the Evidence Act, the legal burden H is on the appellant to establish the fact that he committed the act in a moment of unsound mind (*Jayasena v. R* [1970] 1 All ER 219). In an English case, *Woolmington v. DPP* [1935] AC 462) the court reiterated that for a defence of insanity, the legal burden of proof on the balance of probability, is placed on an accused person. I Expert evidence, which is imperative in matters of unsound mind,

A in order to assist the learned judge as to his affliction, was clearly absent here (s. 45 of the Evidence Act 1950; *Nobin Chunder Banerjee* [1873] 20 W.R (Cr) 70).

[23] Despite all his failures, *viz*, to suggest unsoundness of mind
B at the prosecution's stage, or of his failure to adduce medical evidence, this panel did not shirk from considering this defence, however weak his attempt was (*Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705). Having perused the evidence in totality we were satisfied that this defence had not been successfully established and
C thus could not stand.

[24] By virtue of the appellant's failure to rebut the prosecution's case, it was no surprise that the learned judge was satisfied that the prosecution had proven its case beyond reasonable doubt, hence the finding of guilty, followed by the conviction and sentence of death.
D Based on all the above reasons we likewise had no compunction in dismissing the appeal. We affirmed the finding of guilt, the conviction and also the sentence of death.

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